INDEX

CITATIONS

690596—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 976

JACOB R. STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 345–364) is not yet reported.[1]

JURISDICTION

The judgment of the circuit court of appeals was entered February 18, 1946 (R. 344–345). The petition for a writ of certiorari was filed March 20, 1946. The jurisdiction of this Court is in-

[1] The first opinion of the circuit court of appeals, which was withdrawn (R. 343–344), was not reported and is not included in the Record. It is reproduced in Appendix A of the petition for a writ of certiorari.

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

Petitioner admits that in selling a critical war material (insulated copper wire) he filled orders not bearing an appropriate allocation classification, a purchaser's symbol, or a preference rating of AA–5 or higher, as charged in each of the 11 counts of the information as to which the judgment was affirmed on appeal. The questions presented are:

1. Whether his conviction is void by reason of the fact that only the requirement for a preference rating remained in effect at the times the sales were made.

2. Whether the regulations involved are too vague and indefinite to support a criminal prosecution and conviction.

3. Whether there was evidence to support the jury's finding that petitioner wilfully violated the regulations.

4. Whether, in view of the single factual issue of wilfulness submitted to the jury, the verdicts of guilty on counts 2, 3, 5 to 10, inclusive, 12, 13, and 14 were fatally inconsistent with the verdict of not guilty on count 1.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of the Second War Powers Act and of the regulations promulgated thereunder by the War Production Board are set forth in the Appendix, *infra*, pp. 26–30.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of California, petitioner was convicted on counts 2, 3, 5 to 10, inclusive, and 12 to 17, inclusive (R. 33), of a 17 count information (R. 14–27)[2] charging violations of the Second War Powers Act of 1942 and regulations issued pursuant thereto, in that, during the period from December 3, 1942, to March 16, 1943, he sold copper wire, a critical material, to purchasers not furnishing orders "bearing the appropriate allocation classification and purchaser's symbol and bearing a preference rating of AA–5 or higher, or bearing any allocation classification, purchaser's symbol, or preference rating whatsoever." Petitioner was sentenced to imprisonment for one year on each of these counts, to run concurrently, and to pay a fine of $25,000 to be distributed equally among such counts (R. 37). On appeal to the Circuit Court of Appeals for the Ninth Circuit, petitioner's conviction was reversed as to counts 15,

[2] Counts 4 and 11 were dismissed on motion by the Government before trial (R. 283; Pet. 2), and the jury found petitioner not guilty on count 1 (R. 33).

16, and 17,[3] and affirmed as to all others (R. 365).

It is admitted by petitioner that the sales, as charged in the counts upon which he was convicted, were made by him "to purchasers without procuring from said purchasers an order bearing the allocation classification, purchaser's symbol and preference rating of AA–5 or higher" and that "The *sole issue* to which the evidence was directed concerned the alleged 'willfulness' of" petitioner in making the prohibited sales (Pet. 10). The proof of that issue may be summarized as follows:

In September 1942, petitioner, who was organizer and general manager of Western Sales & Supply Company (R. 206, 243), purchased from Lockheed Aircraft Corporation a quantity of material excess to Lockheed's requirements, including, *inter alia*, about 668,000 feet of insulated copper wire (R. 70, 71) which was no longer needed because of an engineering change in an airplane being produced by Lockheed at that time (R. 73, 75).[4] For about a month prior to petitioner's purchase of this wire, he and Lockheed's materials disposal department manager, Taylor (R. 69–70, 172, 210, 211), admittedly discussed

[3] Reversal of these counts was predicated on the trial court's failure to instruct the jury as to the applicable regulation involved, which had been materially changed before the sales charged therein were made (R. 350–351).

[4] There is no evidence that this wire was unusable by others engaged in war production.

"priority regulations" (R. 211, 172), "governmental instructions and regulations on sales" (R. 75, 210), the nature and character of the materials involved in the transaction (R. 210–211, 172–173), and the fact that the War Production Board had placed "certain restrictions" upon petitioner and would not permit him to purchase certain types of materials, including some of the types offered for sale to him by Lockheed (R. 210, 211, 174, 182). Although the Western Procurement Division, Army Air Forces, had released all of these materials for sale by Lockheed (R. 74), petitioner could not and did not purchase the latter types (R. 210–211, 174, 182) because of the restriction upon him, because "a lot of items were subject to priority regulations" (R. 211, 182), and apparently also in part because Lockheed had on a prior occasion experienced certain difficulties with reference to the disposal of such surplus materials (R. 172–173, 210–211). Before petitioner was permitted by Lockheed to make the purchase of the items which he ultimately bought, including the copper wire, Taylor, "as a representative of Lockheed Aircraft Corporation requested that we stipulate that the materials should be sold [by petitioner] in accordance with the existing rules and regulations of the War Production Board" (R. 70, 182), such stipulation to be included in petitioner's purchase order for the materials. Lockheed's "priorities man" was then

informed of the proposed contents of the purchase order and, in view of petitioner's agreement to require compliance with WPB regulations in reselling the materials, approved their sale by Lockheed to petitioner (R. 173). Thereafter, on September 22, 1942, petitioner, complying with this condition (R. 71, 174, 212, 242), sent to Lockheed a purchase order for the materials, in which he had inserted the statement (R. 300):

> It is also understood that we as buyers, will not under any consideration release any of this material to anyone not in a position to furnish proper priorities or conformance with all rules and regulations as prescribed by the War Production Board.

In October 1942, petitioner, who had no WPB priority for the purpose (R. 127–129), sought to purchase from Lockheed a quantity of steel (R. 234–235) which he intended to resell to others who held the necessary WPB priorities (R. 235). Petitioner discussed his right to purchase this steel with Major Vockrodt, assistant chief of production, Western Procurement Division, AAF (R. 125). He informed Vockrodt that he "had received the approval of the War Production Board, had filed the particular forms with Lockheed as prescribed by the regulations, and, as he understood it, it was mandatory upon Lockheed to furnish the steel to him" (R. 203, 247). Vockrodt replied that "this was aircraft material, and it was the function of the Army Air Force to keep

those materials under their jurisdiction until they decided to release them; that he was issuing no clearances to anyone for aircraft purchase materials, and particularly not to jobbers * * * that * * * he could see no place in the industry or in the business for jobbers" (R. 203). Since petitioner had no WPB priority (R. 127–128, 129), Vockrodt informed him that the AAF would not authorize the release of this steel to him (R. 127, 128).

Copper wire was at no time discussed between Vockrodt and petitioner (R. 125–126, 245).

During the same month, October 1942, one Tooker,[5] associate production supervisor of the production engineering section of the Western Procurement Division, AAF (R. 142, 157), in passing petitioner's Western Sales & Supply Company, noticed a large quantity of steel being transported into the company's yard (R. 144). The duty of Tooker and his section was "to increase the production of all aircraft parts being manufactured by subcontractors within our jurisdiction and to expedite those parts to the prime contractors, * * * inspection, plant protection, metals control" (R. 143), to "determine the end use" (R. 144) of materials considered to be "critical," and to route them "to the end use, AA–1, which is aircraft, if possible and if needed"

[5] Tooker and his successor in office, Chapman, testified as witnesses for petitioner.

(R. 151, 152–153; see also R. 127, 135, 167–168). Tooker therefore went into Western Sales & Supply to determine whether it was routing materials considered by the AAF to be strategic and critical in accordance with prescribed WPB procedure in regard to priority (R. 144, 151, 152–153). Tooker and petitioner discussed this question on various occasions, during one of which petitioner gave Tooker an inventory report of the materials in stock (R. 144–145, 159). Thereafter Tooker specifically informed petitioner that certain of the articles listed were "urgently required," and that petitioner was not to sell them until Tooker's office "gave him a release" (R. 145). Petitioner agreed to cooperate (R. 146). Tooker also informed petitioner that the latter's inventory was too large for Tooker to handle, that he, Tooker, would write a letter to petitioner "freezing" those materials which to Tooker's knowledge either were required or might be required for aircraft use, whose urgency he would determine; that as far as the balance of petitioner's inventory was concerned, petitioner would have to be guided by the Airplane Designers Handbook with reference to the definition of the word "strategic"; that one Smith, materials control coordinator for the Western Procurement Division (R. 150, 151, 154), had the handbook and "could very easily tell" petitioner "whether or not any sales which he made were within the bounds of our freezing order" (R. 153–154). Petitioner asked Tooker

whether "there weren't some [AAF] regulations which would cover the materials for resale from Lockheed." Tooker replied in the negative. (R. 155, 159.)

On November 14, 1942, a further discussion was had between petitioner and Tooker relative to strategic and critical materials (R. 81, 152). Tooker informed petitioner that before the latter could sell strategic materials to vendees having priorities lower than AA–1, it would be necessary for him to obtain a release from the AAF (R. 152–153, 165–166, 170–171). Petitioner mentioned that he had several purchase orders bearing priority rating of A–10. Tooker replied that it was the desire of the AAF to eliminate such orders in favor of higher priorities. (R. 166.)

Thereafter, Tooker prepared a letter, which was sent to petitioner on November 16, 1942, over the signature of Major Zwick, the AAF resident representative (R. 80–82, 148, 152), restating the substance of the directions given to petitioner by Tooker. Petitioner was advised in part that his company was "required to obtain release from this office in writing for sale of all strategic materials, which purchases from vendee are assigned priorities lower than AA–1 * * *. The term 'strategic materials' is to be construed as those materials listed in the Airplane Designers Handbook as 'critical'. * * * Release may be obtained by calling or writing this office stating name and address of buyer, article, name and

part number (if assigned by manufacturer), and priority assigned to vendee's purchase order." (R. 81, 152.)

On or about November 27, 1942, Sullivan, district manager of the Redistribution Division of the WPB (R. 114), asked petitioner whether, "since he proposed to buy surplus inventories * * * he had filed the necessary forms to authorize him to deal in allocated materials under war production orders" (R. 114, 115, 123–125). Petitioner replied that he had filed the forms but that "the forms had been denied" (R. 114–115, 123–125). Sullivan advised him of his right to appeal from the denial, and petitioner stated that he would appeal (R. 114). Sullivan then requested him to refrain from dealing in "allocated materials," including "steel, copper and aluminum, and other surplus materials," until he had won his appeal (R. 114–115, 123–124). No appeal, however, was ever filed by petitioner (R. 115, 240. See also R. 121).

Petitioner next sought to persuade Taylor at Lockheed to release the steel to him, but Taylor refused to do so, since the AAF would not authorize its release (R. 178–179, 237–238). Petitioner thereupon informed Taylor that it was "mandatory" for Lockheed to make the sale to him, or Lockheed "would be in violation of compliance" with a WPB order (R. 179); that he, petitioner, had discussed the matter with the WPB "and had permission of the War Produc-

tion Board" (R. 182). Taylor nevertheless refused to transfer the steel (R. 179, 237).

During this period petitioner also spoke to Daniels, WPB materials redistribution analyst, respecting his right to purchase (R. 185) (but never concerning his right to sell) various materials (R. 186). Daniels, a defense witness, testified unequivocally that "There was no discussion between me and Mr. Stein as to the matter of getting anyone's permission or permit to sell this surplus material" (R. 186).[6] Daniels at no time discussed any copper wire transactions with petitioner (R. 188).

Meanwhile, Tooker, and later Chapman, materials expediter of the AAF (R. 131–132), had been assigned the function of granting releases of the type mentioned in Zwick's November 16 letter (R. 133–134, 135, 156–157). It was part of their duties in this connection "to make sure" that WPB requirements were complied with in each case where a release was sought (R. 134), and both Tooker and Chapman were specifically

[6] Petitioner testified that following Vockrodt's refusal to permit the release of the steel to him, he saw Taylor at Lockheed, who refused to release the steel until the AAF had authorized its release (R. 237); that he then spoke to Daniels who, according to petitioner, instructed him in the preparation of a WPB order "P. D. 83" which would make mandatory the release of the steel (R. 238). Daniels did not testify as to any such transaction or form, and no such form was offered in evidence. In fact, there does not appear to be any form issued by the WPB making mandatory the transfer of any items.

informed by Major Zwick that WPB regulations "had to be complied with" and could not be waived (R. 134; see also R. 140–141, 166). On several occasions thereafter petitioner telephoned to Tooker, and possibly Chapman, for permission to sell materials considered strategic "without a written release" as required by Zwick's letter (R. 147, 150, 152).[7] In some instances oral permission was granted, while in others it was denied (R. 147, 150, 152). On no occasion did petitioner, as he claims (R. 216–217, 248), seek or obtain permission to sell to vendees not having the required WPB priorities (R. 76, 126, 131, 142, 158, 161, 163, 164, 166). And on no occasion did petitioner seek or obtain either from Zwick or Tooker, as he claims (R. 248), a release or permission to sell copper wire (R. 131, 149, 160, 161, 170), nor did he at any time even discuss with Zwick or Tooker copper wire or its disposal (R. 132, 149, 159–160. See also R. 126).

Beginning on December 3, 1942, and on twenty-six subsequent occasions prior to March 18, 1943, the period covered by the information, as well as on numerous occasions thereafter, petitioner sold copper wire to purchasers who did not have the necessary WPB priority (R. 96–114, 242, 303–305, 326–330). Every such sale without priority was

[7] Petitioner admits that the only writing relating to copper wire received by him was the letter of November 16, 1942, from Zwick (R. 245).

made upon his express approval (R. 95, 192–194, 197).

On or about March 17, 1943, Burdge, an investigator for the WPB, called upon petitioner to discuss his sales of copper wire without compliance with WPB priority regulations (R. 77–78). When Burdge informed petitioner that the purpose of his visit was to ascertain whether petitioner had been selling copper wire without receiving preference rated orders, petitioner stated, "We do not feel very kindly to the War Production Board, and we have decided that if they will let us alone, we will let them alone" (R. 78). Burdge advised petitioner that "persons who undertake to engage in business selling critical materials" had to "observe War Production Board rules and regulations in their sales" (R. 78). During this conversation, petitioner admitted to Burdge that he was selling copper wire without priorities, asserting that he "had clearance from the Air Corps" to make the sales, showing to Burdge Zwick's letter of November 16 (R. 80, 84–85, 244, 228). Burdge read the letter, and then stated that he could not see where petitioner "got any authorization from Major Zwick's letter to sell copper wire without a preference rated order" (R. 88). Petitioner did not tell Burdge at any time that he had obtained authority from either Tooker or Chapman to sell the wire without complying with WPB regulations (R. 88), and did not state, as counsel for

petitioner sought to bring out on cross-examination of Burdge, that Chapman had told him that "the permission of the Air Force was all that he needed and that he did not require any War Production Board permission" (R. 88).

On March 18, Burdge, having been given a record of copper wire sales by petitioner (R. 79–80, 303), was asked by either petitioner or his brother whether "it was all right for them to go ahead and sell this copper wire without preference rated orders * * *." Burdge replied that he was only an investigator for the compliance branch of the WPB, and that petitioner should seek information from the priorities division of the WPB as to rights and methods of operation. (R. 86–87.) Following Burdge's visits in March, no change was made by petitioner or his organization in the manner of selling wire (R. 234).

On or about July 7, 1943, Burdge again inspected petitioner's records. Upon noticing that there were a number of invoices covering sales of copper wire subsequent to his previous conversations with petitioner, Burdge questioned petitioner, who replied that he was making such sales. Burdge then stated that he "was amazed to see" that petitioner "was continuing to sell copper wire without receiving preference rated orders * * *," and stated that his previous inquiry should have put petitioner "on notice

that preference rated orders are required for the purchase of that copper wire." (R. 83, 89, 90, 91.) Petitioner replied that he had been to the "priorities division" and had "talked to the boys down there, and they said that I was off the base in acquiring the copper wire in the first place, but that since I had it they saw no reason why I couldn't sell it" (R. 83, 89, 90, 91). Burdge retorted that such statements "amazed" him, and asked petitioner to identify the persons to whom he had spoken. Petitioner replied that he could not do so. (R. 83, 89, 90, 91.) Petitioner subsequently continued to sell copper wire to purchasers who held no WPB priorities (R. 326–330).

ARGUMENT

1. Petitioner's principal contention, based upon the theory of his defense at the trial, is that the evidence failed to show the requisite wilfulness on his part in his violations of the regulations (Pet. 4, 6, 20, 24). This contention is, we submit, without merit.

There was ample evidence that petitioner was well aware at all times of the necessity and importance of complying with War Production Board regulations in handling critical materials. In September 1942, when he acquired the excess materials from Lockheed, he was unable to buy some of the items released by Lockheed because "certain restrictions" had been placed upon him by the War Production Board, and because "a

lot of items were subject to priority regulations" (*supra,* p. 5). Thereafter, in October 1942, he was advised by Army Air Forces authorities that he would not be permitted to buy a quantity of steel from Lockheed because he lacked the necessary War Production Board priority (*supra,* pp. 6–7).

When petitioner acquired the copper wire and other materals from Lockheed, he was required, after considerable discussion of the matter (*supra,* p. 6), to certify on his purchase order that: "It is also understood that we as buyers, will not under any consideration release any of this material to anyone not in a position to furnish proper priorities or conformance with all rules and regulations as prescribed by the War Production Board." Moreover, in November 1942, prior to the sales in question, Sullivan, District Manager of the Redistribution Division of the WPB, asked petitioner, "since he proposed to buy surplus inventories," whether he had applied for authority to deal in "allocated materials." Petitioner replied that his applications had been denied, but that he would appeal. Sullivan then told him (R. 123–124) "that until his appeal was either granted or denied, he must not deal in allocated materials," and "by that I mean steel, copper and aluminum, and other surplus materials" (*supra,* p. 10). Petitioner, in fact, never did appeal, but ignored Sullivan's advice and proceeded to make the ille-

gal sales charged in the information. His true attitude was indicated, we think, when, in February 1943, he told Burdge, the WPB investigator who called upon him to discuss his sales of copper wire in violation of WPB regulations, "We do not feel very kindly to the War Production Board, and we have decided that if they will let us alone, we will let them alone" (*supra*, p. 13). It was further indicated by the fact that notwithstanding Burdge's investigation, petitioner made no attempt to comply with the regulations in making subsequent sales, but continued with his illegal course of conduct, and then when Burdge called to see him again, in July 1943, and expressed amazement that petitioner was still selling copper wire without receiving preference rated orders, petitioner gave the implausible excuse that he had obtained permission to do so from the "boys" at the "priorities division," but could not remember with whom he had talked (*supra*, p. 15).

Petitioner's only defense was that he believed in good faith that the Western Procurement Division, Army Air Forces, and not the WPB, was the controlling authority for distribution of the copper wire and that the sales in question were cleared by him with representatives of that office (R. 213, 214, 215–216, 217–218, 220–223). But this merely presented an issue of fact as to his intent, which the jury decided adversely to peti-

tioner. There can be no doubt, moreover, that the jury so found, because, although the trial judge refused to comment on the evidence (R. 273–274), he did present the issue squarely to the jury when he instructed them that although "neither the Army Air Forces, nor any agent or representative thereof, can relieve any person of the duty of obeying any rule, regulation, or order issued by the War Production Board * * * you may consider any acts or conversations of such representatives, as shown in the evidence, in order to determine whether or not the defendant in doing any act charged by any count of the information acted wilfully, as above defined" (R. 278–279). And during discussion of counsel's exception to this charge, on the ground that the Army Air Forces did have authority to control materials, the court, while refusing to change the instruction in that respect, reiterated: "The Court, however, has already instructed the jury that they may take into consideration the acts and conduct of the Army Air Forces, and that instruction still is valid in determining whether or not the defendant had the requisite intent" (R. 282–283). We submit, therefore, that since there was ample evidence to justify the jury's finding that petitioner wilfully committed the offenses charged, and since the jury refused to believe his claim that he was acting in good faith, which was pointedly called to their attention by the trial judge, petitioner's principal contention

presents no question for further review by this Court.[8]

2. Petitioner also contends (Pet. 4, 6, 16–19, 23–25) that the regulations involved were not sufficiently certain and definite to ground a criminal prosecution, and argues (Pet. 18, 22, 24) that this case affords the Court an opportunity to express for the first time its views concerning the required definiteness of administrative "legislation." But we think that the applicable regula-

[8] Petitioner asserts that the court below upheld his conviction "on the somewhat unusual basis that defendant failed to demonstrate that his excuses were plausible," and refers (Pet. 13–14) specifically to the statement in the opinion (R. 362) that:

"There is no compelling inference from the testimony regarding the purported authority of the AAF that appellant did not willingly violate the law. We cannot say that the evidence negatives the suggestion that appellant was seeking plausible excuses for making the sales in the absence of legal authority to make them."

In this passage, we believe, the court was merely saying that it could find in the evidence no justifiable excuse for the petitioner's actions, and, if anything, was giving to petitioner the benefit of a more searching review of the evidence than that to which he was entitled on appeal. *Abrams* v. *United States*, 250 U. S. 616; *Hemphill* v. *United States*, 120 F. 2d 115, 117 (C. C. A. 9), certiorari denied, 314 U. S. 627. Petitioner's argument, moreover, carefully avoids reference to the fact that the court below stated (R. 360): "We are of the opinion that there was substantial evidence to support the verdict, which in this case required the conclusion of the jury that the unlawful acts had been performed wilfully." And he makes no mention of the circumstance that the court then summarized the evidence justifying this conclusion (R. 360–362).

tions provided a clear basis for petitioner's prosecution and conviction, and that in no sense can it be justly said that he was required to speculate at his peril as to their meaning (Pet. 23).

According to petitioner's own testimony (R. 206–207), he was regularly engaged in distributing to industry and trade a great variety of materials and parts, among which were "rivets, aluminum, steel, aircraft parts, instruments and almost anything that might be found at an aircraft plant."[9] His activities were thus clearly within the express provisions of subparagraph (c) (2) of W. P. B. General Preference Order M–9–a covering all "industrial supplier[s] * * * or other person[s] engaged in the business of distributing * * * wire mill products[10] to in-

[9] In October 1942, petitioner prepared a catalogue listing the materials he had acquired from Lockheed and distributed it to several hundred addresses, such as aircraft and radio companies and associated industries, government departments, and military stations and activities (R. 190–191, 196–197, 199–200, 211–212), thus representing himself to industry and trade as a supplier, *inter alia*, of copper wire. And between November 19, 1942, and September 30, 1943, he made 108 different sales of the copper wire in question to radio stations, moving picture studios, electrical, radio, and television companies, schools, governmental activities, and an aircraft manufacturer (R. 326–330).

[10] Subparagraph (a) (6) of General Preference Order M–9–a defines "wire mill product" as "bare or insulated wire or cable for electrical conduction made from copper or copper base alloy" (*infra*, p. 27).

dustry or trade" (*infra,* p. 28).[11] Contrary to the implications of petitioner's argument (Pet. 16–17), little doubt could have been entertained by him as to the inapplicability of Priorities Regulation No. 13, since that regulation applied only to "special sales of idle or excess materials by persons who are not regularly engaged in the business of selling such materials" (*infra,* p. 29);[12] and, as the court below pointed out (R. 354), although subparagraph (c) (2) (iii) of that regulation did permit "a sale of a single lot of war material * * * at an aggregate price of less than $100," the very next sentence stated, "This exception does not permit the dividing of a single lot having a value of over $100 into smaller lots and selling such smaller lots for less than $100 under this subparagraph" (*infra,* p. 30). It was thus plain that even the sales charged in counts 5, 6, and 9, each of which was for less than $100, did not qualify as "special sales," for petitioner acquired all the wire in one lot, at $.0067 per foot, or a total of $4,475.60 (R. 71). As to the sale charged in count 7, contrary to petitioner's argument (Pet. 16–17), there was no proof that it was made to a

[11] Petitioner admits that "All of the transactions involved, indeed all of the sales by petitioner of the copper wire in question, were made in the ordinary course of business * * *" (Pet. 6–7).

[12] The sale of the wire by Lockheed to petitioner came within this regulation, since it was excess to the needs of the aircraft plant, which was "not regularly engaged in the business of selling" such wire.

wholesaler so as to bring it within the provisions of subparagraph (c) (2) (iv) and Schedule A of Priorities Regulation 13 (Pet. App. p. 25) permitting special sales to "wholesale dealers who sell the material in the form held by holder."

Neither should there have been any honest doubt, as petitioner implies there was (Pet. 16), as to the applicability of subparagraph (b) (1) of General Preference Order M–9–a to his sales of insulated copper wire, for that subparagraph applied to deliveries of "copper" and subparagraph (a) (1) defined "copper" as meaning the basic refined metal, such as "cathodes, wire bars, ingot bars, ingots, cakes, billets, wedge bars or other refined shapes, or copper shot or other forms produced by a refiner" (*infra*, p. 27).

It is obvious, we think, that each order and regulation to which petitioner refers had a clearly specified purpose, covering its own special and distinct field. There was no conflict between them, nor was any so vague and indefinite that petitioner was unable to determine in advance how to avoid un unlawful course of conduct. They, therefore, conformed to the standard recently laid down in *Kraus and Bros., Inc.* v. *United States,* No. 198, this Term, decided March 25, 1946, pp. 5–6, slip opinion. The confusion in the regulations sought to be suggested in the petition is the result simply of the industry of counsel. It is significant that at the trial

petitioner expressed no doubt as to the matters now raised, but merely claimed that he relied upon alleged permission from the Army Air Forces to make the deliveries charged and, as we have shown (*supra*, p. 3), the jury refused to believe him, as they had a right to do.

3. Petitoner contends that the revocation of Priorities Regulation No. 10 on November 5, 1942, before any of the sales were made, removed any valid basis for his conviction (Pet. 4, 6, 13–14).

Each count of the amended information alleged that in making a sale of copper wire petitioner did "fill an order [not] bearing the appropriate allocation classification and purchaser's symbol and [not] bearing a preference rating of AA–5 or higher," and it "was stipulated or not contested" (Pet. 10) that the sales were so made by petitioner. The revocation of Priorities Regulation No. 10, on November 5, 1942 (7 F. R. 9028), eliminated the theretofore existing provision for the allocation classification and purchaser's symbol (7. F. R. 4198), leaving only the requirement for a preference rating of AA–5 or higher, insofar as the sales charged in the information were concerned. But this fact cannot be said to have prejudiced petitioner. In one respect it actually increased the burden of proof cast upon the Government, making petitioner's conviction dependent upon proof that all three items were missing from

the orders in question when the absence of only one would have been sufficient to establish guilt.[13] In any event, the point is of no consequence, for, as petitioner admits, "all of the substantive acts were admitted by the [petitioner] upon the trial, and the only issue of fact presented to the jury was the element of wilfulness required by the Act" (Pet. 5).[14]

[13] The trial court, in instructing the jury, required them to find that all three items were lacking from the orders for the particular wire (R. 276); and while technically this may have been erroneous, it benefited petitioner, as we have explained above. Contrary to petitioner's assertion (Pet. 15), moreover, we do not believe that it could have been vital in impelling the jury's finding of wilfulness on the part of petitioner.

[14] Petitioner lists as one of the "questions presented" an alleged inconsistency in the jury's verdict of not guilty on count one and guilty on the other counts, when "the only issue of fact presented to the jury was the element of wilfulness required by the Act" (Pet. 5). In Appendix G to his petition, he argues that the rule established by this Court in *Dunn* v. *United States*, 284 U. S. 390, 393, that "consistency in the verdict is not required," should be reconsidered, because "there was not before the jury in the *Dunn* case a single issue as to the three counts" there involved (Pet. 34–35). But we see no compelling reason for reconsidering the rule adopted in the *Dunn* case and later reaffirmed in *Borum* v. *United States*, 284 U. S. 596, and *United States* v. *Dotterweich*, 320 U. S. 277, 279. As the Court said in the *Dunn* case, quoting with approval from *Steckler* v. *United States*, 7 F. 2d 59, 60 (C. C. A. 2): "We interpret the acquittal as no more than their [the jury's] assumption of a power which they had no right to exercise, but to which they were disposed through lenity." 284 U. S. at 393. And "juries may indulge in precisely such motives or vagaries." *United States* v. *Dotterweich*, *supra*.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL 1946.

APPENDIX

Section 2 (a) of the Second War Powers Act of 1942 (c. 199, Title III, § 301, 56 Stat. 177, 50 U. S. C. Supp IV, 633), after authorizing the President, in aid of the effective prosecution of the war, to determine priorities and allocate materials and issue regulations and orders in aid thereof, provides:

> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

War Production Board General Preference Order M–9–a (7 F. R. 3424, 5043), as amended August 1, 1942 (7 F. R. 5980), and October 30, 1942 (7 F. R. 8825), provided, in pertinent part as follows:

> Whereas the national defense requirements have created a shortage of copper, copper base alloys and products thereof, as hereinafter defined, for defense, for private account, and for export, and it is necessary in public interest and to promote the defense of the United States, to conserve the supply and direct the distribution thereof:
>
> *Now, therefore, it is hereby ordered:*
>
> § 933.2 *General Preference Order* M–9–a—
>
> (a) *Definitions.* For the purpose of this

order: (1) "Copper" means copper metal which has been refined by any process of electrolysis or fire refining to a grade and in a form suitable for fabrication, such as cathodes, wire bars, ingot bars, ingots, cakes, billets, wedge bars or other refined shapes, or copper shot or other forms produced by a refiner.

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(4) "Dealer" means one who receives physical delivery of copper and sells or holds the same for sale without change in form.

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(6) "Wire mill product" means bare or insulated wire or cable for electrical conduction made from copper or copper base alloy.

(b) *Allocation of copper*—(1) *Deliveries of copper by dealers or refiners.* No delivery of copper shall be made by any dealer or refiner except upon presentation by the person requesting the delivery of an allocation certificate duly issued by the Director General for Operations (hereinafter called the Director); except that notwithstanding the foregoing, copper of foreign origin imported under bond or drawback agreement may be reexported by a refiner pursuant to an export license duly issued by the Office of Export Control, Board of Economic Warfare.

* * * * *

(c) *Deliveries of brass mill products or wire mill products.* Except as expressly authorized or directed by the Director:

(1) No brass mill or wire mill shall fill any order which has not been approved on a Form PD-59D.